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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1283

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, JOHN W. BANKS, WILLIAM T. BANDY, JR., HARVEY B. EDWARDS, ANTHONY J. GALATE, DENVER O. NELL, R. DUANE ROGERS,

Petitioners,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820

Attorneys for Respondent, The Kansas City Terminal Railway Company

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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OPINIONS BELOW

The opinion and order of the District Court (Appendix B to Petition) is reported at 442 F. Supp. 1173. The opinion of the Court of Appeals (Appendix C to Petition) is reported at 587 F.2d 903.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Respondent Kansas City Terminal Railway Company disagrees with the statement of Questions Presented made by Petitioners. Petitioners' first two questions are *not* presented to this Court, as we will discuss, *infra*. The *sole* question presented to this Court is:

Whether the Court of Appeals erred in affirming the District Court's decision that Special Board of Adjustment No. 605's Award No. 408 failed to conform, or confine itself, to matters within the scope of the Board's jurisdiction.

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U.S.C., Sections 151 et seq. are set forth in the Petition at pages 2-4.

COUNTERSTATEMENT OF THE CASE

Respondent cannot adopt Petitioners' statement of the case. We believe that the statement of the case prepared by the District Court and by the Court of Appeals accurately and succinctly states the relevant facts, and we commend the following abridgement to the Court.

Petitioner Brotherhood of Railway, Airline and Steamship Clerks, etc. ("BRAC"), is an unincorporated labor

organization which is the duly authorized representative pursuant to the provisions of the Railway Labor Act (45 U.S.C. §§ 151 et seq.) of the craft or class of clerical and related employees, as well as towermen and telegraphers of the Respondent Kansas City Terminal Railway Company ("Terminal"). Terminal is a "carrier" within the meaning of the Railway Labor Act.

On February 7, 1965, pursuant to the provisions of the Railway Labor Act, a collective bargaining agreement between all of the nation's railroads represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such carriers represented by five railroad labor organizations was executed. The agreement has been in effect since February 7, 1965 and is called the "Stabilization Agreement."

The Stabilization Agreement provides for a category of "protected employees." Reductions in the numbers of protected employees in the work force may be made by Terminal in the event of a decline in the carrier's business in excess of stated amounts according to criteria and procedures set forth in Article I, Section 3 of the Stabilization Agreement as supplemented by a July 2, 1970 agreement between Terminal and BRAC.

In June and July of 1975, the jobs of approximately 210 employees of the Mail and Baggage Department who were protected employees under the Stabilization Agreement were abolished, and they were reduced to furlough status when Terminal lost its mail contract with the U. S. Postal Service and the Mail and Baggage Department was closed. On-premises grievance procedures were exhausted, and BRAC submitted the dispute to a disputes committee established under the Stabilization Agreement pursuant

to 45 U.S.C § 153. Special Board of Adjustment 605, in considering the three issues formulated and submitted by BRAC, determined that the February 7, 1965 agreement applied to employees of the Mail and Baggage Department. However, the Board concluded that the agreement was intended to provide protection to employees in the event of a decline in the carrier's business rather than to protect employees when the work performed by them disappeared entirely and the Award so stated.

BRAC then sought to have this Award set aside. Its Complaint in the District Court was filed July 21, 1977. On September 14, 1977, Terminal moved to dismiss. Following substantial briefing, the District Court's order dismissing the Complaint was entered December 27, 1977. BRAC perfected its appeal to the Court of Appeals which affirmed the District Court.

Argument

Terminal disagrees with BRAC's statement of the case, not in its chronology, but because BRAC states the contentions of the parties and characterizes the Award to suit BRAC's own purposes in this proceeding. It must, however, be remembered that BRAC's interpretations were urged to and rejected by the Special Board. Accordingly, BRAC's statements that the employees are protected from certain occurrences (Petition, pp. 5-6); as to the circumstances of furlough (Petition, p. 5); as to Terminal's "greater rights" (Petition, p. 6); that Terminal contended that the Stabilization Agreement "became" inapplicable to certain employees upon the closing of the Mail and Baggage Department (Petition, pp. 7-8); and that Terminal contended that these employees "lost" protection upon the closing of the Mail and Baggage Department (Id.); are not statements of fact. Rather, they are BRAC's contentions about the Stabilization Agreement and the contract dispute—contentions which were made to and rejected by the Board in its Award. BRAC now seeks review of the lower decisions that the Award was not wholly baseless and without reason essentially on the grounds that the Board wrongly rejected BRAC's contentions. We submit BRAC simply seeks review of the Award on the merits.

We also disagree with BRAC's characterizations of the conclusions reached in the Award. (Petition, pp. 8-9). The Award has been reproduced in the Appendix to the Petition at page 1a and speaks for itself.

BRAC submitted the issue to the Special Board. The Board ruled against BRAC. BRAC then challenged the Award which it itself had requested. Both the District Court and the Court of Appeals rejected BRAC's claims and BRAC now seeks to present them to this Court under guise of a Petition for Certiorari. We are not here to dispute what the agreement between the parties provides or does not provide; whether it protects all or only some employees; whether it protects them from all or only certain occurrences; or whether the agreement gives protected employees no rights in certain circumstances. Such issues cannot be raised in a proceeding to review a special board award under the Railway Labor Act, and are not before this Court. This Court is petitioned to make a discretionary review of a decision that an arbitration board's award did not exceed the jurisdiction of that board.

The merits of this dispute have been decided. The only issue presented to this Court is whether the courts below erred in ruling that the merits *had* been decided and that BRAC had failed to show that the decision was beyond the jurisdiction of the Special Board which entered it.

REASONS WHY THE WRIT SHOULD BE DENIED

1. There Is No "Split of Authority" Among Courts of Appeal As Claimed by Petitioner.

A. The Claimed "Split" Does Not Exist.

No amount of semantic exercise can convert this case into one warranting review by this Court on certiorari.

Petitioners argue that there is a "split" among the Courts of Appeal as to the jurisdictional basis for review of Special Board awards and that the "split" has created confusion as to the standards by "which the validity of awards of Special Boards of Adjustment should be measured." (Petition, p. 13). The Petition, however, has failed to demonstrate the existence of any divergence between Courts of Appeal on any issue which is in this case. As pointed out in the Petition, a split may have existed between 1969 and 1977 by reason of the Seventh Circuit's holding, in *Brotherhood of Railway, Airline and Steamship Clerks* v. *Special Board of Adjustment No. 605,* 410 F.2d 520 (7th Cir. 1969), that federal courts have no jurisdiction to review awards of Special Boards of Adjustment. However, that holding was reversed in *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen,* 551 F.2d 144 (7th Cir. 1977) ending any divergence among the Courts of Appeal.

Whether courts have found a jurisdictional basis to review such awards under the express language of the Railway Labor Act or under 28 U.S.C., Sections 1331 and 1337 is a distinction without a difference because the same standard of review is applied. The Court of Appeals for the Fourth Circuit, finding jurisdiction under Title 28, ruled:

> "The judgment will be vacated and the case remanded to the district court for the limited purpose of deciding whether Board No. 813 *exceeded its jurisdiction* in making the award under attack in this case." *Employees Protective Ass'n* v. *Norfolk and W. Ry. Co.,* 511 F.2d 1040, 1046 (4th Cir. 1975) (Emphasis added).

And the Seventh Circuit, in *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen,* 551 F.2d 144, 152 (7th Cir. 1977) noted the need for uniformity of standards, citing this Court's decision in *International Association of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963) and rewarded to the district court in accord with the Fourth Circuit's decision.

Thus, *all* of the Courts of Appeal which have considered the question of the standard of review to be applied in a challenge to an award of a voluntary special board have ruled that the award must be upheld unless the board exceeded its jurisdiction. *Brotherhood of Railway, Airline and Steamship Clerks* v. *Kansas City Terminal Ry. Co.,* 587 F.2d 903 (8th Cir. 1978); *Merchants Despatch Transp. Corp.* v. *Systems Fed., etc., Carmen, supra; Employees Protective Ass'r* v. *Norfolk and W. Ry. Co., supra; see Thomas* v. *Illinois Central R. Co.,* 521 F.2d 208, 212 (5th Cir. 1975). The claimed conflict among the Courts of Appeal has no substance.

Neither is there merit in BRAC's contention that this Court has not "spelled out the precise meaning of the statutory standards" in Section 3, First (q). (Petition, p. 13). This Court, in *Gunther* v. *San Diego & A. E. R. Co.,* 382 U.S. 257 (1965) has spoken on the scope of review under the identical standard in Section 3, First (p) and the Courts of Appeal have relied on *Gunther* in reviewing special board awards. Moreover, *Gunther* dealt directly

with the "excess of jurisdiction" standard under which BRAC sought review.

B. Neither the Decisions Below nor the Record Raise the Questions Presented in the Petition As the Parties Were Agreed on Jurisdiction and the Standard of Review.

Petitioners' claim that there was confusion about the jurisdictional base or the proper standard of review is without substance.

On or about February 9, 1978 BRAC filed with the United States District Court the following statement of issues on appeal (reproduced as Appendix A hereto):

> "1. Whether the District Court failed to properly apply the standards prescribed in the Railway Labor Act [45 U.S.C., Section 3, First (q)] for review of an award of a Special Board of Adjustment?
>
> 2. Whether the District Court erred in failing to set aside Special Board of Adjustment No. 605's Award No. 408 for exceeding its authority and jurisdiction in its finding that employees of the Mail and Baggage Department of appellee, while entitled to protective benefits under stabilization agreement of February 7, 1965, could nevertheless be deprived of those benefits by appellee, who closed down the Department while continuing to operate and to have employees?"

The District Court noted in its Order Granting Defendant's Motion to Dismiss that the parties were not in disagreement over the applicable standard of review, noted the three grounds specified in Section 3, First (q) under which a Special Board order might be set aside, and noted that "[t]here is no contention by BRAC that grounds for review exist under either of the first two provisions.

Therefore, Award 408 of Special Board 605 must be upheld unless the Board is shown to have acted outside the scope of its jurisdiction." The District Court then stated that it was unable to find that Special Board 605 exceeded its jurisdiction.

In its brief in the Court of Appeals, BRAC repeated the same two issues which it was appealing. (BRAC Brief to the Court of Appeals, p. 2). There was no claim by BRAC at any time that the District Court had applied an improper standard of review or had done so under an incorrect jurisdictional base. To the contrary, BRAC stated in its brief:

> "The District Court granted the Motion to Dismiss but found that there was jurisdiction to review Award No. 408 under the standard set forth in Sections 153, First (p) and (q) of the Railway Labor Act. (45 U.S.C., Sections 153 (p) and (q)).
>
> The appellants, BRAC et al. do not contest the District Court's finding that Award No. 408 is subject to judicial review pursuant to the standards of the cited provisions of the Railway Labor Act.
>
> . . .
>
> The appeal of BRAC does not, therefore, raise an issue with respect to the decision of the District Court to apply the standards of Sections 3, First (p) and (q), Railway Labor Act, to the review of Award No. 408, but rather to the District Court's decision as to the scope of review under those statutory provisions, and the application thereof to the award." (BRAC Brief to the Court of Appeals, pp. 14, 19; footnotes omitted).

Accordingly, not only is there no issue in this case about the jurisdiction of the District Court to review the

award, there is no issue as to the standard of review to be applied.[1] BRAC claimed the District Court did not correctly apply the standard, not that it applied the wrong standard. The parties agreed as to the proper standard of review; they disagreed only as to the application of that standard to the facts. BRAC simply argues that the District Court applied the standard incorrectly because it decided the issue against BRAC.

BRAC evidenced no such claimed confusion at the District Court and, after the District Court decided against it, BRAC then framed the issues for appeal to the Court of Appeals. Now, after both the District Court and the Court of Appeals have answered the question put to them by BRAC, BRAC is dissatisfied with their answers. We submit that the alleged "split" is akin to BRAC's underlying argument that, while BRAC framed the three questions posed to the Special Board of Adjustment, and, presumably, that Special Board would have had jurisdiction to answer the questions in BRAC's favor, the Special Board had no jurisdiction to decide the question against BRAC and against its contentions. BRAC's attempted creation of a "split" among the Courts of Appeal is an obvious effort to disrupt settled law as to the finality of Railway Labor Act Adjustment Board awards and the

1. This was recognized by the Court of Appeals which stated:

"Although a decision of a special board of adjustment, *not* the NRAB, is under review in this case, the district court concluded, *and the parties agree, that the same statutory standards are applicable.*

. . .

The parties agree that neither failure to comply with the requirements of the chapter, nor fraud and corruption by a member of the board, is at issue. The sole basis for the requested relief is that the order given did not confine itself to matters within the scope of the Board's jurisdiction." 587 F.2d at 905, 906. (Emphasis added).

applicable standards of limited judicial review, and to inject the federal judiciary into railroad labor-management disputes as a "super" board of adjustment. *Union Pacific Railroad Co.* v. *Sheehan*, 99 S.Ct. 399 (1978); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257 (1965); *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33 (1963); *Union Pacific R. Co.* v. *Price*, 360 U.S. 601 (1959); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950). *See, United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2. The Decisions Below Are Clearly Correct.

A. BRAC's Argument Summarized.

The essence of BRAC's argument to the courts below and now to this Court is found on pages 13 through 18 of its Petition. It is in these 6 pages that BRAC tries to show both that the Board made a mistake in not finding for BRAC in the first place and that the District Court and Court of Appeals erred in their application of the only standard of review BRAC requested them to use. BRAC asked the District Court to find that the Board had failed to confine itself to matters within the scope of the Board's jurisdiction, the only one of the three possible challenges permitted under Section 3, First (p) & (q) of the Railway Labor Act which BRAC raised. To place BRAC's argument in perspective, we must refer to what the Board's Award actually awarded.

The first question BRAC submitted to the Special Board was:

> "(1) Does the February 7, 1965 Agreement apply to the employees of the Baggage and Mail Department of the Kansas City Terminal Railway Company?"

The Board's answer was:

"Question No. 1 answered in the affirmative." (Petitioner's Appendix 1a, 5a).

The second question which BRAC submitted to the Special Board was:

"(2) Does the loss of a mail contract, between the U.S. Postal Service and the Kansas City Terminal Railway Company, nullify the provisions of the February 7, 1965 agreement?"

The Board's answer was:

"Question No. 2 disposed of as per Opinion of the Board." (Petitioner's Appendix pp. 1a, 5a).

The third question BRAC asked the Board was:
"(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such time as they are deprived of those benefits under the express terms of such Agreement?"

The Board answered the third question:

"Question No. 3 answered in the negative." (Petitioner's Appendix, pp. 1a, 5a).

After summarizing the positions and the contentions of BRAC and of Terminal with respect to the three questions, and principally with respect to question No. 3, the Board stated:

"A thorough review of the record at hand compels this Board to conclude that the February 7, 1965 Stabilization Agreement was intended to provide protection to employes in the event of a decline in the Carrier's business. Said Agreement was not intended, in our opinion, to accord protection to employes when the work previously performed by them disappears entirely. The February 7, 1965 Agreement simply did not address the question of what was to happen when there was a complete cessation of the Company's business. And merely because the Terminal Company was still engaged in activities separate and apart from mail handling, this nonetheless does not alter the fact that the mail handling work previously performed by the Claimants was completely abolished when the United States Postal Service vitiated their contract with the Terminal Company." (Pet. Appendix A, pp. 3a-4a).

BRAC now says, as it said to the District Court and the Court of Appeals: Because the Board found that the Agreement was silent concerning and did not give protection to the employes in circumstances disclosed by the record, there is, therefore, no basis in the language of the Agreement for the award. (Petition, p. 16). This circular reasoning constitutes the whole of BRAC's six-page argument that the Board exceeded its jurisdiction and that the Courts below erred in not so finding. If the Board had decided the third question in the affirmative, we submit that BRAC would claim that the award was within the Board's jurisdiction and that it was entitled to essentially absolute finality. According to BRAC, however, the Board lacks jurisdiction to decide the issue and to answer the question against BRAC. BRAC argues for the strange situation where it can submit the dispute for arbitration but the arbitrator can decide the dispute only one way and remain within his jurisdiction.

BRAC pressed the courts below to give effect to language in *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969) as authority for its position that Special Board No. 605's interpretation of the Stabilization Agreement must find some basis in the affirmative language of the Agreement. The *Central of Georgia* Court explained the limited standard of review repetitively approved by this Court:

> "The broad leeway that courts must afford to arbitrators' decisions stems from the fact that '[i]t is the arbitrator's construction which was bargained for; *and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 1960, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424, 1429." *Id.* at 412. (Emphasis added).

As the Court of Appeals below pointed out, "it is apparent that the appeals court considered [BRAC's touted language] a restatement of its 'without foundation in reason or fact' standard." 587 F.2d at 907 n.3.

Certainly the language of a labor agreement is as significant in what it does *not* say as in what it says. Parties may agree *not* to agree. They may deliberately and knowingly prepare an agreement which does *not* speak to certain factual situations. In the instant case, the arbitrator found that the contract upon which BRAC relies did not provide the substantive relief or the remedy BRAC sought through the arbitration process because it was silent as to the involved circumstance. The decision by an experienced and informed Board of Arbitrators determined that the job protection provisions of an agreement negotiated by two experienced and informed parties did *not* apply, and had never applied, to a specific factual situation. How such a construction can then be claimed not to be "based in the language of the written agreement" defies reason.

B. Neither Court Below Erred in Refusing to Grant BRAC De Novo Review of the Award.

BRAC's reasoning throughout this case has been deceptively simple: BRAC claimed that the award must be in excess of the Special Board's jurisdiction because it lacks a basis in the language of the February 7, 1965 Stabilization Agreement *as BRAC construes that Agreement.* Almost every party which loses a contract construction arbitration could make the same claim. The parties voluntarily bargained for the Board's experienced and expert construction and application of the Agreement and BRAC submitted the issues for construction to the Board. It is not BRAC's views as to the construction and application of the Stabilization Agreement against which the arbitration Board's award was to be tested, but whether the award reflects and is based on the *Board's* construction and application of the Agreement. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Manifestly, Award No. 408 is based on the Board's construction of the Agreement.

C. BRAC Made the Same Arguments to the Board of Adjustment As It Made to the Courts Below.

BRAC's arguments raised beginning on page 13 and continuing through the end of the Petition are nothing more than reworded variations of the arguments which BRAC made or should have made to and which were rejected by Board No. 605—arguments which were succinctly

summarized in the Award itself. (See Appendix A to Petition, pp. 2a-3a). This alone would have formed a sufficient basis for the action of the courts below. *Union Pacific Railroad Co.* v. *Sheehan*, 99 S.Ct. 399 (1978); *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257, 263-64 (1965). The Board concluded that the Stabilization Agreement did not provide the protection which BRAC contended it did. BRAC has circuitously sought a second bite from the apple by seeking a judicial ruling on the merits of the dispute, thus recasting its arguments for the courts below as reasons why the Award exceeded the Board's "jurisdiction," and here as an "unfair result" caused by a "split" in the Circuits. In a decision which was cited by the Court of Appeals, District Judge James Meredith identified and rejected this same flawed approach in *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Railway Company*, 296 F. Supp. 507, 510 (E.D. Mo. 1968), *app. dism'd*, 419 F.2d 933 (8th Cir. 1969), *cert. denied*, 400 U.S. 818 (1970):

> "The essence of what Frisco is requesting of this Court is an interpretation of the provisions of the bargaining agreement between the parties. Frisco is requesting an interpretation that the Board exceeded its jurisdiction in that it wrongly interpreted the Scope Rule. The Court is, thus, requested to rule that the Board's interpretation of the Scope Rule was incorrect. This would not be a ruling on the jurisdiction of the Board, but a review of the merits of the Board's decision. Congress and the Supreme Court have made it very clear that the courts are not to substitute their opinion for that of the Board's. The courts may set aside a decision of a board only if it is 'wholly baseless and completely without reason.' The decision must be 'actually and indisputably without foundation in reason or fact.' "

Understandably, BRAC's Petition is devoid of any rationale for escaping the explicit language of the Award which refers to the Stabilization Agreement, discusses its interpretations as contended by the parties, cites a prior decision as precedent for the Board's reasoning, and concludes that the Stabilization Agreement was not intended to provide BRAC substantive entitlement to the relief it claims. To argue that the Board's decision was "wholly without basis" in the February 7, 1965 Stabilization Agreement because BRAC finds no specific provisions denying its claims, is on a par with arguing that a contract for a sale of a horse cannot be said to be inapplicable to the sale of a cow because there is no specific exclusion of cows in the contract.

The Board, after carefully considering the provisions and the purposes of the agreement, concluded it applied only to separations from service caused by a decline in a carrier's business, and not to what the Board found was a complete cessation of all the work the employees had previously performed. A reading of the Board's opinion, in and of itself, is sufficient to show the speciousness of a contention that the award is wholly baseless.

BRAC does not deny that the dispute was submitted to the Board; it does not deny that it framed the questions posed to the Board; it does not deny that it briefed the issues; it does not deny that it argued its contentions to the Board; it cannot deny that its contentions here as to the merits of the dispute are in any material respect different from those which were or should have been urged to and which were ruled on by the Board. To reargue those merits is exactly what BRAC wants.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL M. DIBBLE
STUART W. CONRAD
LATHROP, KOONTZ, RIGHTER, CLAGETT, PARKER & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820
Attorneys for Respondent, The Kansas City Terminal Railway Company

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Plaintiffs,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Defendant.

STATEMENT OF ISSUES

Come now appellants and submit the following statement of issues:

1. Whether the District Court failed to properly apply the standards prescribed in the Railway Labor Act [45 U.S.C., Section 3, First (q)] for review of an award of a Special Board of Adjustment?

2. Whether the District Court erred in failing to set aside Special Board of Adjustment No. 605's Award No. 408 for exceeding its authority and jurisdiction in its finding that employees of the Mail and Baggage Department of appellee, while entitled to protective benefits under stabilization agreement of February 7, 1965, could never-

theless be deprived of those benefits by appellee, who closed down the Department while continuing to operate and to have employees?

Knipmeyer, McCann, Fish & Smith

By Glenn McCann

1800 Power & Light Building
Kansas City, Missouri 64105
211-9500

Highsaw, Mahoney & Friedman

By James L. Highsaw

1050—17th Street, N.W.
Washington, D.C. 20036
296-8500

Attorneys for Plaintiffs

Of counsel:

William J. Donlon, General Counsel

Brotherhood of Railway and Airline Clerks
6300 North River Road
Rosemont, Illinois 60018

A copy of the foregoing was mailed this 9th day of February, 1978, to: William J. Donlon, 6300 North River Road, Rosemont, Illinois 60018; and to Sam D. Parker, Harlan D. Burkhead and Stuart W. Conrad, 1500 TenMain Center, Kansas City, Missouri 64105, Attorneys for Defendant.

.....